No. 89-1474

(1)

In The

Supreme Court of the United States

October Term, 1990

McDERMOTT INTERNATIONAL, INC.,

Petitioner,

vs.

JON C. WILANDER,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED FOR REVIEW

I.

When a worker is injured on a fixed platform in the Persian Gulf, but claims status as a seaman under the Jones Act, 46 U.S.C. 688, by alleging connection to an American-flagged vessel, how is the United States District Court to determine which of the conflicting definitions of status constitutes American law, specifically, whether transportation-related employment functions are a pre-requisite to status under the Act?

LIST OF PARTIES

The following are the parties to this proceeding:

Jon C. Wilander
Plaintiff-Respondent

McDermott International, Inc.[1]
Defendant-Petitioner

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[1] *Subsidiaries, Affiliates and Partnerships of McDermott International, Inc.* (Excluding Wholly-Owned Subsidiaries)

Davy McDermott Ltd.
Initec, Astano Y McDermott International Inc., S.A.
Malmac Sdn. Bhd.
McDermott Arabia Company Limited
McDermott-ETPM, Inc.
P. T. McDermott Indonesia
McDermott Incorporated
B&W Mexicana, S.A. de C.V.
Bobcock & Wilcox Beijing Company, Ltd.
Diamond Power Hubei Company Ltd.
Babcock & Wilcox Gama Kazan Teknolojisi Anonim Sirketi
Thermax Babcock & Wilcox Private Ltd.
Hudson Northern Industries, Inc.
Rotovent S.A. de C.V.
Diamond Power (Autralia) Pty. Limited
Halley & Mellowes Pty. Ltd.
Heerema-McDermott (Aust.) Pty. Ltd.
HeereMac
Panama Offshore Chartering Company, Inc.
McDermott (Nigeria) Limited
McDermott Scotland Limited
MMC – McDermott Engineering Sdn. Berhad
P. T. Babcock & Wilcox Indonesia
P. T. Bataves Fabricators
Topside Contractors of Newfoundland, Ltd.
Arabian Petroleaum Marine Construction Company
DB/McDermott Company

LIST OF PARTIES-Continued

Abahsain Hudson Heat Transfer Co. Ltd.
Construcciones Maritimas Mexicanas, S.A. de C.V.
ASEA Babcock PFBC
B&W Fuel Company
B&W Nuclear Service Company
Babcock-Ultrapower Jonesboro
Babcock-Ultrapower West Enfield
Diamond Power Specialty Limited
Especialidades Termomecanicas S.A. de C.V.
Babcock & Wilcox Services, Inc.
KBW Gasification Systems, Inc.
North American CWF Partnership
Palm Beach Energy Associates
Maine Power Services
PowerSafety International, Inc.
South Point CWF

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DECISIONS BELOW

The decision of the United States Court of Appeals, Fifth Circuit, is reported at 887 F.2d 88 (5th Cir. 1989).

Unreported decisions of the District Court bearing on this issue, including the Court's ruling on Relator's Motion for Judgment on Findings of the Jury; and on Relator's Motion of Judgment N.O.V. are reproduced in the appendix.

STATEMENT OF JURISDICTION

This Honorable Court has jurisdiction pursuant to the granting of a Writ of Certiorari on the 18th of June, 1990, to review the judgment of the United States Court of Appeals, 5th Circuit, entered on the 30th of October, 1989.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1). The Petition for Writ of Certiorari was filed timely pursuant to 28 U.S.C. 2101(c).

STATUTES PRESENTED FOR REVIEW

The Jones Act, 46 U.S.C. 688(a):

(a) Application of Railway Employee Statutes; Jurisdiction

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or

extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

Federal Employers Liability Act, 45 U.S.C. 51:

§51 Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence, employee defined.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any

defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

STATEMENT OF THE CASE

Jon. C. Wilander was injured on the 4th of July, 1983, in the course of his employment with McDermott International, Inc., a Panamanian corporation which does no business in the United States. [RI 436-40][1]

Wilander's employer had a contract for the work of which he was a part with the Qatar General Petroleum Corporation (QGPC), a governmental entity owned by the Sultanate of Qatar.

Wilander's job description was "painter foreman." He had executed contracts to that effect with his employer, the first in March of 1982 in New Orleans and a renewal in March of 1983 in McDermott's office in Dubai,

[1] The records in this bifurcated trial are designated as RI for the March, 1988 status litigation and RII for the July damage trial.

from which it conducted its Middle Eastern operations [J.A. 31, 54].

As a painter foreman, Wilander was called upon to supervise a crew of workmen, primarily Filipinos. The work of his crew consisted of sand-blasting, and then painting, various fixtures and piping located on the platforms owned by QGPC.

When Wilander was on a particular assignment which required him to remain offshore overnight, he slept, ate, and planned his job activities aboard the McDermott Derrick Barge DB-9, a Panamanian-flagged vessel owned by his employer. For five days of the total 15 months he spent in the Middle East, Wilander was given the use of the M/V GATES TIDE, an American-flagged vessel outfitted as a "paint boat."

The GATES TIDE, owned by Tidex International, Inc., was loaded with sand pots, an air compressor, a backhoe, and other equipment used by the painting and sand-blasting crew. During the five days Wilander had use of the GATES TIDE, it was also used to transport him and his men through the production field for the purpose of taking inventory on storage barges; transporting the crew to and from the DB-9; and, when the paint boat was tied up to a platform, to serve as Wilander's primary support station in furtherance of his platform duties.

The GATES TIDE was time-chartered to McDermott International, Inc. [D.Ex. 3, RI 220]. It first came on the job on the 29th of June, 1983, five days before Wilander's accident [D.Ex. 3, RI 220]. During that time, Wilander was assigned no navigational duties aboard the GATES TIDE. He was not considered by the master of the GATES TIDE

as a member of its crew. [D.Ex. 6, RI pp. 430-2; D.Ex. 3, RI 220; D.Ex. 4, RI 220; RI 220-224]

Wilander was injured when he was asked by a co-worker to inspect a pipe on the third level of the platform to determine if it was leaking. In the course of performing this task, a 3/8-inch bolt serving as a plug in the pipeline blew out under pressure, striking Wilander in the head.

On August 2, 1984, Wilander instituted suit against his employer, McDermott International, Inc. in the United States District Court for the Western District of Louisiana, asserting jurisdiction to lie therein pursuant to the Jones Act, 46 U.S.C. 688. In his complaint, Wilander claimed status as a seaman, but alleged connection to no particular vessel. He did not join any count for maintenance and cure [J.A. 6].

During the course of the litigation, acting through counsel, he specifically waived any claim for unseaworthiness, opting instead to base his claim solely on his employer's alleged breach of its statutorily-imposed duty to provide him with a safe place to work [J.A. 4, Minute Entry of 07-28-88].

McDermott contested Wilander's status as a seaman and his entitlement under the Act, first by Motion for Summary Judgment [J.A. 13, Ruling of the Magistrate]. Attached to that Motion was Affidavit of Daniel P. Ledet, a personnel supervisor for the employer, which outlined Wilander's job description. That description did not include any duties assigned to him by his employer relating to the navigation of any vessel [J.A. 166].

Opposed to this Motion, Wilander filed his own Affidavits, which alleged he conducted various navigational functions, including tossing lines, assisting in the tying up and securing of the vessel, and, along with all others on the boat, keeping a sharp lookout for mines in this war zone [J.A. 168, Affidavit of Wilander]. He also termed the issuance of a Panamanian seaman's card [J.A. 156] significant, but McDermott issued thousands of those and used them, not as identification of workers by trade, but as traveling documents [RI, pp. 476-7]. In any case, Wilander never contended navigation of vessels was his job; he was a painter foreman.

The U.S. Magistrate ruling on the Motion found McDermott had not satisfied the existing test for excluding Wilander from status, expressed in *Offshore Company v. Robison*, 266 F.2d 769 (5th Cir. 1959). The case then proceeded to trial in bifurcated fashion, with the issues related to Wilander's status under the Act being tried first.

By two procedural devices during that trial, counsel for McDermott once again questioned Wilander's satisfaction of the *Robison* standard, re-examined in the *en banc* decision of *Barrett v. Chevron U.S.A., Inc.*, 781 F.2d 1067 (5th Cir. 1986), specifically, that Wilander had not established that his job responsibilities satisfied the substantiality test embodied in *Barrett*. Given a choice of four possibilities (the fixed platform upon which he was injured; the Panamanian-flagged DB-9; the American-flagged GATES TIDE; and an unidentified group of vessels known as the "Tidex Fleet"), the jury chose all four, finding Wilander was connected to all by virtue of his employment.

The Fifth Circuit concluded its test of substantiality voiced in *Barrett* applied as "American Law." Then, it concluded Wilander had presented "sufficient evidence to support the jury's finding" on status with respect to the GATES TIDE, thus granting him a Jones Act remedy, although he would not meet the transportation function requirement of other Circuits. The judgment of the trial court on status was affirmed and made final, while issues of liability and damages were remanded for trial on unrelated grounds.

It is to that decision this Petition is directed.

SUMMARY OF ARGUMENT

I.

When an oilfield worker claims status under the Jones Act, *46 U.S.C. 688*, he can only establish his entitlement to proceed thereunder as a "seaman" if he proves (1) a permanent connection, more or less, with a vessel in navigation; and (2) that he contributed to the function of such a vessel by performing significant navigational duties.

II.

By its terms, the Jones Act applies to seamen. Decisions of the Fifth Circuit, which broaden that term to include workers whose job responsibilities have nothing to do with navigation, are in conflict with decisions of this Court defining "traditional maritime activity" and "navigation." Those decisions can only be harmonized by ruling that an oilfield worker such as Wilander is outside the scope of coverage of the Act unless, in addition to his

non-maritime oilfield activities, he contributes significantly to the function of the vessel to which he claims attachment in its use *as a vessel*.

III.

The transportation function test embodied in *Johnson v. John F. Beasley, supra,* is consistent with the purpose of the Jones Act and should be adopted as the uniform national rule.

ARGUMENT

Analysis of Wilander's Claim for Seaman Status Requires Consideration of His Transportation Function to be Consistent With the History and Development of Jones Act Remedies

With its grant of *certiorari* in this case, the Court has an opportunity to formulate a uniform national rule regarding the scope of coverage under the Jones Act, 46 U.S.C. 688. There has been no such rule for 35 years, primarily because of the Fifth Circuit's insistence on applying a test which does not require the putative seaman to perform navigational duties, i.e., those related to the navigation of the vessel as a means of transport over water rather than its "special mission." *Offshore Company v. Robison,* 266 F.2d 769 (5th Cir. 1959); *Barrett v. Chevron U.S.A., Inc.,* 781 F.2d 1067 (5th Cir. 1986).

Other Circuits use aid to navigation as a determining factor. *Johnson v. John F. Beasley Construction Company,* 742 F.2d 1054 (7th Cir. 1984); *Simko v. C&C Marine Maintenance Company,* 594 F.2d 960 (3rd Cir. 1979). The split among the

Circuits is exclusively over whether or not to include within the scope of Jones Act coverage those persons who, while required to be aboard ship in connection with their employment and advancing in some way the broad mission of the ship, have no part to play in its transportation/navigation function.

Since Wilander would not be covered under American law but for the jury's finding of an employment-related connection with an American vessel, the consequence of the lack of a uniform American rule is magnified.

The Court has clearly enunciated the circumstances under which American law applies to a maritime transaction. *See, Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, 90 S.Ct. 1731, 26 L.Ed.2d 252 (1970); *Lauritzen v. Larsen*, 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254 (1953). The Fifth Circuit has distilled the Court's decisions to a determination that the flag of the vessel is the single most important factor in deciding which law to apply. *Schexnider v. McDermott International, Inc.*, 817 F.2d 1159, 824 F.2d 972 (5th Cir. 1987), *cert. den.* 484 U.S. 977, 108 S.Ct. 488, 98 L.Ed. 2d 486 (1987) [affirmed other grounds, 868 F.2d 717 (5th Cir. 1989), *cert. den.* 110 S.Ct. 150, 107 L.Ed.2d 108 (1989)].

The following propositions therefore ensure:

(1) Wilander has a Jones Act cause of action if, and only if, he has an employment-related connection with an American vessel;

(2) Wilander's connection with that American vessel must be determined in accordance with American law;

(3) Under *Robison-Barrett*, Wilander presented sufficient evidence for the case to go to the jury on seaman status; and,

(4) Under the test of other Circuits, utilizing the transportation function analysis, he did not.

Seamen's Remedies Before the Jones Act

The first case of the modern era establishing the relationship between an injured seaman and his employer arose from an *in rem* libel by a crew member to recover for injuries he had received in carrying out an order given by the ship's master. There was apparently no question that the order was improvidently given, and led directly to the injuries of which the seaman complained in his libel.

In propounding his interpretation of the existing maritime law remedies available to seamen at that time, Justice Brown declared the law "settled" upon the following propositions:

1. That the vessel and her owners are liable in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued.

2. That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by a seaman in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship. (Citation Omitted)

3. That all the members of the crew, except, perhaps, the master, are, as between themselves, fellow servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of his maintenance and cure.

4. That the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident.

The Osceola, 189 U.S. 158, 23 S.Ct. 483 (1903).

The concept of "unseaworthiness" as established in the Opinion clearly provided such a remedy to persons employed on board ship. The development of this concept, particularly when considered in connection with the later-passed Jones Act, has been a key component in what one commentator has classified as a "revolution" occurring in the 1930's and 1940's with respect to liability for such damages. The genesis of this revolution was the passage of the Jones Act in 1920.

The Jones Act: Relationship With FELA, "Haverty," and The LHWCA Amendments

The Merchant Marine Act of 1920 contained a significant alteration to the then-existing omnibus statute enacted " . . . to promote the welfare of American seamen in the Merchant Marine of the United States; to abolish arrest and imprisonment as a penalty for desertion . . . ; and to promote safety at sea." 38 Stat. 1164 (1915). What we now term the Jones Act, 46 U.S.C. 688, which was enacted as Section 33, provided a common law right of

action and, thereby, broadened the scope of remedies outlined in *The Osceola*. The overall purpose of the Act was stated as follows:

> That it is necessary for the national defense and for the proper growth of its foreign and domestic commerce that the United States shall have a Merchant Marine of the best equipped and most suitable types of vessels sufficient to carry the greater portion of its commerce and serve as a naval or military auxiliary in time of war or national emergency . . . and it is hereby declared to be the policy of the United States to do whatever may be necessary to develop and encourage the maintenance of such a Merchant Marine. . . . " Report of the 66th Congress, Session II, Chapter 250 (1920), at p. 988.

The relationship to maritime commerce provided dual bases upon which the authority of Congress to enact the legislation rested: the Commerce Clause of the Constitution, Article I, Section 8, Clause 18; and, the constitutional grant to the Court of the judicial power to determine the validity of "all cases of admiralty and maritime jurisdiction" (Article III, Section 2. *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 63 S.Ct. 488, 87 L.Ed. 596 (1943).

The Jones Act shares its commerce clause connection with the Federal Employers Liability Act. The FELA protects workers "while engaging in commerce between any of the several states or territories, or between any of the states and territories . . . and any foreign nation or nations . . . " (*45 U.S.C. 51*).

Maritime commerce, like interstate commerce, is an activity which Congress may regulate. It is also an area

over which the national Government has an interest in creating a uniform rule, as first recognized in *Southern Pacific Company v. Jensen*, 244 U.S. 205, 37 S.Ct. 524 (1917), which precluded the New York Worker's Compensation Commission from limiting a worker killed while engaged in stevedoring activities to a compensation remedy.

When there has been any doubt of a worker's status with respect to interstate commerce, and inclusion under FELA, the worker's connection with transportation activities has been the determinative factor. *See, Shanks v. Delaware, L. & W. R. Co.*, 289 U.S. 556, 36 S.Ct. 188, 60 L.Ed. 436 (1916). Even the expanded definition recognized to exist in the 1939 amendment is limited by the Court to its transportation connection. In *Reed v. Pennsylvania Railroad Co.*, 351 U.S. 502, 76 S.Ct. 958, 100 L.Ed. 1366 (1956), a clerk in the railroad company's office was found to have substantial impact on transportation activity, and thereby, on interstate commerce, even though her job was limited to filing blueprints of bridges, railroad cars, and tracks. Justice Milton, in concluding she was covered, said:

> The benefits of the Act are not limited to those who have cinders in their hair, soot on their shoes, or calluses on their hands. Section 1 cannot be interpreted to exclude petitioner from its benefit without further consideration of the function she performs and its impact on interstate commerce.

The parallels with the Jones Act, and Justice Douglas' characterization of those who do not "hand, reef, and steer" as seamen in *Norton v. Warner Co., infra*, are obvious. The difference is, the Court has never extended

the FELA to cover persons without at least some connection to the transportation activity which, under both Acts, constitutes "commerce."

After the passage of the Jones Act, a stevedore engaged in the same activity as Jensen was held entitled to use it to bring an action against his employer. *International Stevedoring Company v. Haverty*, 272 U.S. 50, 47 S.Ct. 19 (1926). Reacting to *Haverty*, Congress passed the Longshore and Harbor Worker's Compensation Act in 1927, which excluded from its coverage "master[s] and members of crews of any vessel." [33 U.S.C. 903(b)]

Judicial interpretations made of a railroad worker's status under FELA are usually cast in terms of his relationship to interstate commerce; a putative Jones Act seaman's relationship to the commerce of his vessel; and, the relationship of a longshoreman under the LHWCA to, first, work to be performed on navigable waters and, currently, maritime employment. Similarities abound.

In *Jensen, supra*, the Court said, in failing to grant a worker status under the FELA:

> Evidently the purpose was to prescribe a rule applicable where the parties are engaging in something having *direct and substantial connection with railroad operations*, and not with another kind of carriage recognized as separate and distinct from transportation on land and not merely adjunct thereto. It is unreasonable to suppose that Congress intended to change long-established rules applicable to maritime matters merely because the ocean-going ship concerned happened to be owned and operated by a company also a common carrier by railroad. *Jensen*, at p. 527. [Emphasis Added]

Ever-mindful of the commerce clause restrictions upon the reach of the Act, courts, over 30 years, developed a "moment of injury" rule for disposing of FELA cases, essentially stating that a worker could move in and out of zones of coverage of the FELA, depending upon the work which he was doing at the time of his injury. *See, e.g. McCoy v. Southern Pacific Co.*, 83 P.2d 970 (Ca. 1938), *cert. den.* 305 U.S. 639, 59 S.Ct. 106, 83 L.Ed. 411 (1938). This "hypertechnical" distinction was eliminated by the amendments to the FELA in 1939 which allowed an employee to place himself within the coverage of the Act if his duties "directly or closely and substantially" affect interstate commerce (Act, Aug. 11, 1938).

The Jones Act was not similarly amended by Congress. However, the 1940's and 1950's saw a like expansion, by the Courts, in the status of workers covered under its umbrella.

The Court held a worker who "performed such additional tasks as throwing the ship's rope and releasing or making the boat fast" but "performed no navigation duties;" "had no duties while the boat was in motion . . . [,] slept at home and boarded off ship" was covered under the LHWCA rather than the Jones Act. *South Chicago Coal and Dock Company v. Bassett*, 309 U.S. 251, 60 S.Ct. 544 (1940).

The determinative factor in *Bassett* was whether this engine mechanic performed navigational duties:

> [T]he general sense of the work crew is "equivalent to ship's company" . . . in *The Bound Brook*, D.C. 146 F. 160, 164, it was said that "when the single 'crew' of a vessel is referred to, those persons are naturally and primarily meant who

are on board her aiding in her navigation. . . . " Judge Howe in *The Buena Ventura*, D.C. 243 F.2d 97, 99, thought that statement was a fair summary, and, in his view, one who served the ship "in her navigation" was a member of the "crew."

But, citing many of the same authorities, Justice Douglas four years later expanded the definition by finding a bargeman who lived, ate, and slept on a barge a seaman, even though his duties were those of a laborer. *Norton v. Warner Co.*, 321 U.S. 565, 64 S.Ct. 747 (1944). In so doing, the oft-quoted expansive interpretation of "crew" appears:

> . . . [N]avigation is not limited to "putting over the helm." It also embraces duties essential for other purposes of the vessel. Certainly members of the crew are not confined to those who can "hand, reef, and steer."
>
> *Norton*, 321 U.S. at p. 572; 64 S.Ct. at p. 751.

The Court in 1957 found a dredge company's employee who lived onshore but performed such tasks aboard the dredge as making soundings; washing and cleaning navigational lights while the dredge was in transit; but, was injured on land incident to his employment, presented sufficient facts to have a jury determine his status:

> . . . [b]ecause there was testimony introduced . . . tending to show that he was employed almost solely on the dredge, that his duty was primarily to maintain the dredge during its anchorage and for its future trips, and that he would have significant navigational function when the dredge was put in transit . . .

> *Senko v. La Crosse Dredging Corporation*, 352 U.S. 370, 373-4; 77 S.Ct. 415, 417-18 (1957).

Comparing the ruling with the facts through the dissenter's eyes is revelatory both of the revolutionary development of Jones Act status, and the ease with which ordinary, land-based tasks can be transformed into seaman's duties:

> There is nothing in the record to indicate that petitioner was responsible for the seaworthiness of the dredge, or that he ever performed or was qualified to perform any duties of that type. True, he cleaned lights, but these were not "navigation" lights, as the dredge did not carry the latter, except when under tow. In effect, he cleaned lanterns and placed them when the construction work continued at night. Again, he took "soundings" but in spite of the maritime flavor of the phrase, the facts permit no salty inference, since the soundings were taken not in aid of navigation (the dredge being completely stationary at such times), but only to measure the amount of silt pumped from the canal. All this means is that Senko occasionally measured the work progress on an earth-removal project, a task about as nautical as measuring the depth of a natural swimming pool under construction in marshy ground . . . he was simply a handy-man and assistant for a crew of men operating an earth-removing machine which happened to be afloat and which, occasionally and always in Senko's absence, was pushed from place to place.
>
> *Senko, supra*, Dissent of Justice Harlan, 352 U.S. at 376-78.

The majority in *Senko* was obviously emboldened by the Court's summary reversal of a Fifth Circuit ruling which had distinguished a member of a ship's crew from

a member of an oil drilling crew. *Gianfala v. Texas Company*, 350 U.S. 879, 76 S.Ct. 141, 100 L.Ed. 775 (1955); *reh. den.* 350 U.S. 960, 76 S.Ct. 346 (1956).

The clear import of the Court's action in *Gianfala*, coupled with the expansive interpretation of navigational function in *Senko*, provided adequate foundation for Judge Wisdom's familiar *Robison* test:

> [T]here is an evidentiary basis for a Jones Act case to go to the Jury: (1) if there is evidence that the injured workman was assigned permanently to a vessel (including special purpose structures not usually employed as a means of transport by water, but designed to float on water) or performed a substantial part of his work on the vessel; and (2) if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips.
>
> 266 F.2d 769 (5th Cir. 1959)

Although not dispensing with the requirement that a worker be involved in navigation, it liberalized the definition of navigation to include all those functions of the vessel performed in maritime commerce.

The "special function" feature of *Robison* has been used to extend coverage under the Jones Act to workers not traditionally found within its ambit, and who are by no usual definition of the work a member of a "ship's company" or "crew". However, the twin requirements of permanency and contribution to the special function of the vessel have traditionally restricted the circumstances

to which the expansive definition could be applied. An oilfield worker such as Robison is a member of the crew primarily because his job requires him to live, eat, and sleep aboard a structure whose only use requires it to float on water. Others, whose activity is just as necessary to the "special function" of the vessel, but who lack the permanency connection, are not.

The LHWCA's Definition of "Member of a Crew" and of "Maritime Employment"

The Fifth Circuit thereafter employed a method of defining coverage under either the Jones Act or the LHWCA by first determining whether the subject worker was a seaman under *Robison*. This test was employed even if the plaintiff was engaged in activities enumerated in 33 U.S.C. 903(b), such as a longshoreman, a ship builder, or a ship repairer. *See, Crador v. Louisiana Department of Highways*, 625 F.2d 1227, 1229 (5th Cir. 1980); *Reynolds v. Ingalls Shipbuilding Division, Litton Systems, Inc.*, 788 F.2d 264 (5th Cir. 1986), *cert. den.* 479 U.S. 885, 107 S.Ct. 278, 93 L.Ed.2d 253 (1986).

Congress amended the LHWCA in 1972 to define "maritime employment." Since the LHWCA is, like the FELA and the Jones Act, grounded in the Commerce Clause, this amendment must have some effect, either limiting or expanding, on the status of persons seeking its coverage relative to their role in the commerce regulated by the Act.

In spite of the 1972 amendments to the LHWCA, and in spite of clear Supreme Court precedent placing statutorily-defined longshoremen outside the scope of Jones

Act coverage [*see, Swanson v. Marra Brothers*, 328 U.S. 1, 66 S.Ct. 869, 90 L.Ed. 1045 (1946); *Kyles v. James W. Elwell & Company*, 296 F.2d 703 (7th Cir. 1961), *cert. den.* 369 U.S. 852, 82 S.Ct. 936, 8 L.Ed.2d 10 (1962)], the Fifth Circuit still clung to *Robison*.

It was not until 1987 that the Fifth Circuit adopted a test for coverage designed to exclude statutorily-defined longshoremen from the scope of coverage under the Jones Act rather than the reverse, using *Robison* as a starting point. *Pizzitolo v. Electro-Coal Transfer*, 812 F.2d 977 (5th Cir. 1987), *cert. den.* 484 U.S. 1059, 108 S.Ct. 1013, 98 L.Ed. 978 (1988).

> Congress could have hardly made it clearer that it intended to afford complete coverage to employees engaged in the occupations enumerated in the [LHWCA] act so long as the location of injury met the situs test so that harbor workers who worked on both vessel and the adjacent dock would not walk in and out of coverage during the course of their work. The benefits of the Act were extended to them while working on land adjacent to the water . . . . Although the Supreme Court has had occasion to consider the definition of "employee" under the amended Act in several cases, it has not addressed whether an employee engaged in one of the occupations expressly covered by the LHWCA is eligible for Jones Act benefits. Our cases, however, provide support for the view that a workman engaged in one of these occupations is unqualifiedly covered by the LHWCA and therefore ineligible for benefits under the Jones Act.
>
> *Pizzitolo*, at p. 982.

Other Courts, even with the benefit of *Robison*, and without the clarifying 1972 amendments, had already reached that conclusion:

> Longshoremen, as a matter of law, have not been regarded as crewmen of a vessel belonging to their employer and, therefore, are not qualified to maintain a civil action against their employer-vessel owner under the Jones Act.
>
> *Bowers v. Kaiser Steel Corporation*, 422 P.2d 848 (Ak. 1967).

Other Erosions of the Robison Standard:
Herb's Welding v. Gray

One of the fundamental pillars of support for *Robison* collapsed when this Court decided *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 105 S.Ct. 1421, 84 L.Ed.2d 406 (1985).

Gray was a welder for his employer, which provided its services to the owners of drilling platforms. He spent about three quarters of his working time on platforms in state waters and the rest on fixed platforms on the Outer Continental Shelf. He built and replaced pipelines and did general maintenance work on the platforms that he serviced. Although of a different craft, his job duties bore the same relationship to the platform as the functions being performed by Wilander in the Persian Gulf.

Gray was injured when he burned through a gas flow line on a fixed platform located in state waters, causing an explosion. *Certiorari* was granted to determine whether the Court of Appeals had properly applied the test for maritime connexity espoused in *Rodrigue v. Aetna Casualty and Surety Company*, 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360 (1969).

The question before the Court was: is oil drilling activity, together with the crafts required to perform it, maritime employment when it takes place under, in connection with, or on navigable waters?

In answering that question in the negative, the Court first found "untenable" the proposition that everyone on board a stationary drilling platform in state waters should be covered under the LHWCA. The *Rodrigue* rule that stationary drilling platforms are outside the admiralty jurisdiction of the U.S. District Courts was also reemphasized.

In finally holding Gray not to be engaged in "maritime employment," the Court considered as significant, and quoted, remarks made by the general counsel of the International Association of Drilling Contractors to the Senate Subcommittee which was then considering whether to extend the LHWCA to its workers:

> Irrespective of design, bottom resting, semi-submersible, or full-floating, these structures [drilling platforms] perform only as a base from which the drilling industry conducts its operations. The operations, once the structure is in place, are no different from that which takes place on dry land. All of the equipment and methods utilized in the drilling operations are identical to our land-based operations.
>
> *Herb's Welding*, 470 U.S. at p. 425; 105 S.Ct. at p. 1428, Footnote 11.

It has been argued that the Court's *Herb's Welding* decision should be limited to its facts, that is, applied solely to determinations of coverage under the LHWCA. When read together with *situs* cases, this reasoning fails. In *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S.

249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972), the Court required that a plaintiff establish the admiralty jurisdiction of Article III Courts by establishing a "significant relationship" between the alleged wrong and "traditional maritime activity." *409 U.S. at p. 268*. If oil drilling is not "traditional maritime activity" as per *Herb's Welding*, then persons claiming status under an Act passed pursuant to the Commerce Clause, which the courts have uniformly interpreted as requiring a connection to maritime commerce to be enforceable, lose part of their argument.

Given the *Rodrigue* rule placing claims on offshore platforms outside the admiralty jurisdiction on a *situs* test, a move completely approved by the Court in *Herb's Welding*, additional analysis is required to establish the water-borne connection between the questioned activity and the jurisdiction sought to be invoked. In *Executive Jet*, the Court cited, with approval, the following quotation from the Sixth Circuit:

> Absent such a relationship, admiralty jurisdiction would depend entirely upon the fact that a tort occurred on navigable waters; a fact which in and of itself, in light of the historical justification for federal admiralty jurisdiction, is quite immaterial to any meaningful invocation of the jurisdiction of admiralty courts.
>
> *Chapman v. City of Grosse Pointe Farms*, 385 F.2d 962, at p. 966 (6th Cir. 1967).

The Court must harmonize *Executive Jet*, *Herb's Welding*, and *Rodrigue* by declaring those activities related to offshore oil drilling are not "traditional maritime activity." Once this is established, the weak negative authority

established by the Court in *Gianfala, supra,* must of necessity be overruled, and with it, *Robison,* insofar as its broad definition of navigational function is concerned.

Wilander was employed outside the territorial jurisdiction of the LHWCA or the Outer Continental Shelf Lands Act, 43 U.S.C. 1333(b). Therefore, his activities in this regard were never scrutinized. But if oil-related jobs do not constitute maritime employment, the authority granted under *Robison-Barrett* to make oilfield workers seamen loses its potency, particularly for people like Wilander, whose role with respect to maritime employment was tenuous to begin with.

Robison at the Barricades:
Johnson, Simko, Barrett, et al

While giving lip service to the *Robison* standard, and in some cases citing it directly and claiming to abide by its terms, a worker's connection with navigational responsibilities began to take on increasing significance in the middle 70's. The Fourth Circuit, citing two Fifth Circuit *Robison*-test cases, found a person who performed "intermittent non-navigational duties aboard a barge" outside the scope of Jones Act coverage. *Whittington v. Sewer Construction Company, Inc.,* 541 F.2d 427 (4th Cir. 1976). Along the way, the opinion also performed its own independent analysis of the *Senko-Bassett* rule, and classified a "member of [the] crew" as one "naturally and primarily on board to aid in her navigation." *Whittington,* at p. 434.

Another babystep away from the *Robison* standard, and into navigation, occurred when the Third Circuit held:

> . . . [A] maritime worker who does not actually go to sea but who is injured while performing duties on a navigable vessel must establish that he performs significant navigational functions with respect to that vessel in order to recover under the Jones Act.
>
> *Simko v. C&C Marine Maintenance Company,* 594 F.2d 960 (3rd Cir. 1979), *cert. den.* 444 U.S. 833, 100 S.Ct. 64, 62 L.Ed.2d 42 (1979).

Meanwhile, other Circuits, to greater or lesser degrees, chose to use the "navigational function" test. The Second Circuit holds seamen are only those aboard a vessel "naturally and primarily as an aid to navigation." *Salgado v. M. J. Rudolph Corp.,* 514 F.2d 750 (2nd Cir. 1975). The Sixth is likewise, saying a worker "satisfies the 'in aid of navigation requirement' if his duties contribute to the operation of the vessel." *Peterson v. Chesapeake and Ohio Railway Company,* 784 F.2d 782 (6th Cir. 1986).

The Eighth has cited *Robison* as its test. However, it defines a vessel as "virtually any floating structure used for *transport* in navigable waters." *Slatton v. Martin K. Eby Construction Company, Inc.,* 506 F.2d 505 (8th Cir. 1974). The Ninth appears to require association with the navigational function of the vessel, at least as respects fisheries workers whose duties do not contribute to the navigation of the vessel. *Worthington v. Icicle Seafoods, Inc.,* 774 F.2d 349 (9th Cir. 1984), *cert. den. in part* 474 U.S. 900, 106 S.Ct. 270, 88 L.Ed.2d 224 (1985). So, although frequently cited, *Robison* is always distinguished.

Only the Seventh Circuit has made a frontal assault on *Robison*. An ironworker brought a Jones Act claim against his employer, which was also a construction barge owner, in the federal courts of Illinois. First noting that "[c]laims brought under the Jones Act have not been litigated frequently in this Circuit," the Court reviewed all pertinent status litigation, including *Robison*, with a critical eye:

> . . . [W]e think the second part of the *Robison* test strays from important Jones Act principles when it speaks of the employee's duties as having to relate only to the "function of the vessel or the accomplishment of its mission" without further qualifying "function" and "mission" in terms of the *transportation* functions and mission of the vessel . . . .
>
> Because a Jones Act "seaman" is one who is a member of a *crew of a vessel* . . . , and because a "vessel" under the Jones Act, while interpreted liberally, has been consistently defined as a floating structure that must have as one of its functions the transportation of personnel or materials across navigable waters . . . we believe it is the employee's relation to the transportation function of the vessel, i.e., whether the employee contributes to the maintenance, operation, or navigation of the vessel as a means of transport on water, that is critical for Jones Act purposes. Such an interpretation fulfills what we believe to be the central purpose of the Act: to provide protection for those subjected to risks associated with the transportation function of vessels on navigable waters.
>
> *Johnson v. John F. Beasley Construction Company*, 742 F.2d 1054 (1984), *cert. den.*, 469 U.S. 1211, 105 S.Ct. 1180, 84 L.Ed.2d 328 (1985), at pp. 1061-2. [Emphasis Added]

In espousing this interpretation of the Jones Act, the *Johnson* Court was entirely consistent with the purposes for which the Jones Act was passed; with the definitions of "commerce," as had been judicially made in *Reed* and *Jensen, supra*, and legislatively in the 1972 amendments to the LHWCA; and with that quality which separates those who earn their livelihood from the commerce of the sea, and are thus within the zone of protection intended to be afforded by Congress to American merchant mariners, and those whose work, while having a water vista, is the same as that performed on land.

Those who continue to favor the *Robison* standard jealously guard its applicability. In fact, Judge Wisdom had occasion to point out dramatically the differences between *Robison* and those Circuits employing a "navigational function" test when he was sitting by designation in a Ninth Circuit case.

His forceful dissent classified *Robison's* inclusion of oilfield workers as seaman as a "generally accepted principle" which had withstood the test of time. He also claimed navigational requirements have been liberally interpreted by Courts. Even so, the other two judges on the panel held a research scientist killed when he fell overboard from an oceanographic research vehicle was outside the scope of seaman status because his duties were scientific, not navigational. *Craig v. M/V PEACOCK*, 760 F.2d 953 (9th Cir. 1985).

Against this background, the Fifth Circuit granted *en banc* rehearing in *Barrett v. Chevron U.S.A., Inc.*, cited *supra*. *Barrett* is usually cited as a reaffirmation of *Robison*, with an additional deference to the substantiality of the

time a worker spends in maritime versus non-maritime employment. After *Barrett*, many cases have resulted in a mathematical percentage assessment of a worker's land-based as opposed to water-based duties. This assessment tends to place people either inside or outside the scope of Jones Act coverage, depending on the amount of work done in either locale. *See, e.g., New v. Associated Painting Services, Inc.*, 863 F.2d 1205 (5th Cir. 1989). The most significant holding of *Barrett* is to reaffirm the *Robison* requirement for the submission of these essentially fact-based matters to the jury.

Four of the Circuit's judges specially concurred "in order that there can be a rule on the question in our Circuit . . . " but would have preferred to adopt the *Johnson* rule. In so stating, Judge Gee said, for the four specially concurring judges:

> So long as Jones Act benefits are more attractive than those of the other marine compensation schemes, astute counsel will seek to qualify their clients as "seamen," A bright-line rule is called for, one that nudges coverage back towards the blue-water sailor for whom the Jones Act was meant. The *Johnson* test is such a rule; I would adopt it if I could. But because it is more important to have a rule than to have the correct one, I concur.
>
> *Barrett, supra*, Special Concurrence of Judge Gee, et al, at P. 1076.

Other special concerns were voiced by Judge Rubin for five others who dissented from part of the verdict. He wrote:

> Seaman status is generally a question for the jury and should be left for the jury determination *even when the claim to seaman status appears relatively marginal*. Status should be decided as a question of fact and not by summary judgment unless there is no genuine dispute of material fact, and the uncontroverted facts inescapably determine status as a matter of law.
>
> *Barrett, supra*, Dissent of Judge Rubin, at p. 1078.

Judge Rubin's position has continued to be a mischief-maker in the status determination area. Such deference to what a jury might do continued to create problems, even after *Barrett*. *See, e.g., Leonard v. Dixie Well Service & Supply, Inc.*, 828 F.2d 291 (5th Cir. 1987); *Complaint of Patton-Tully Transportation Company*, 797 So.2d 206 (5th Cir. 1986); *International Oilfield Divers v. Pickle*, 791 F.2d 1237 (5th Cir. 1986), *cert. den.*, 479 U.S. 1059, 107 S.Ct. 939 (1987); *Smith v. Odom Offshore Surveys, Inc.*, 791 F.2d 411 (5th Cir. 1986); and many others which place an assortment of welders, roustabouts, drillers, rig watchers, and other oilfield workers within the scope of seaman status, at least with respect to whether or not the issue should be submitted to a jury.

In practice, *Barrett* gives lip service to the jury trial function of the Jones Act, while reserving status questions to Judges. Juries have trouble with concepts as ill-defined as "substantiality." Even lawyers have a difficult time defining the terms, and, as a result, judges tend to read the standard *Robison* definition to the jury. Such a reading, in Wilander's case, resulted in the jury finding him connected, by reason of his employment, to every structure and/or vessel which he encountered in his job. *Simko, supra*, is another case where the marginal worker

was classified as a seaman, primarily because he worked on water. The Rule has operated to create seamen of those workers whom the jury classifies as seamen, unless a judge rules they are not, as a matter of law, and the jury's view of "seamen" does not often comport with traditional admiralty motives – contact with the sea is usually enough.

Some judges take a more expansive view than others. In the Eastern District of Texas, after *Robison* but before *Barrett*, a helicopter was found to be a vessel, and a helicopter pilot was ruled a seaman because his work in transporting personnel and equipment from land to the drilling rigs upon which he touched down was an integral part of the special function of the rig – to drill for oil. In reaching that opinion, Judge Fisher stated the following:

> The Court recognizes that today's finding that the helicopter was a vessel is a departure from the traditional concept of a vessel. The result it reaches today is no more strange than the Fifth Circuit cases holding that movible [sic] offshore drilling platforms are vessels for Jones Act purposes . . . .
>
> *Barger v. Petroleum Helicopters, Inc.*, 514 F.Supp. 1199 (E.D. Tex. 1981).
>
> Enough said.

Wilander, as a Person With Only Marginal Claim to Status Under the Jones Act, Should be Especially Scrutinized With Respect to the Transportation Functions He Performed

Close cases require critical scrutiny of the facts. While Wilander would not have seemed to fit even the

Fifth Circuit test for status, the Fifth Circuit's finding of a sufficient evidentiary basis under *Robison-Barrett* ends that inquiry. While we do not concede the case is close, if it is, even more attention to detail is warranted.

Citing an earlier Supreme Court case, *Johnson* recognized:

> If the Jones Act is to retain any limitations on its coverage, we believe the employee's duties with respect to the transportation function of the vessel should define them. We conclude that *when the person's status as a member of the crew is equivocal* the work done by [the] employee will be crucial . . . . [Emphasis Added]
>
> *Johnson, supra,* citing *Braen v. Pfeiffer Transportation Company,* 361 U.S. 129, 131; 80 S.Ct. 247-249; 4 L.Ed.2d 191 (1959).

Critically viewing the tripartite connection required for the inclusion of a marginal seaman such as Wilander within the Act is entirely appropriate, consistent with the Court's review of status questions under the FELA, LHWCA, and the Jones Act, and brings such a definition of status closer to the legislative purpose of the Act: to provide for the safety of merchant mariners and sailors, not *oilfield workers*.

Those who oppose a narrow definition of status invariably urge, as did Judge Wisdom in his *Peacock* dissent, that such will remove from Jones Act coverage "bartenders and musicians on cruise ships, maids and stewards on passenger ships, and many other members of a ship's crew who have no more to do with navigation than [the decedent] had." *Craig v. M/V PEACOCK, supra,* at p. 957.

As Justice Harlan pointed out in his *Senko* dissent, this begs the question:

> I do not, of course, contend that men such as ship's cooks cannot be members of a crew merely because their actual jobs have nothing to do with making the vessel move. The vital distinction is that such men do contribute to the functioning of the vessel *as a vessel* – as a means of transport on water. Not so *Senko*, whose duties had absolutely nothing to do with the dredge in its aspects as a *vessel*.
>
> *Senko*, 352 U.S. 370, 377; 77 S.Ct. 415, 415, Footnote 5.

If it can be said that Wilander's job had anything at all to do with the sea, a dubious proposition at best, it had nothing to do with the movement of vessels. The primary hazards to which Wilander was exposed were those inherent in the construction work he was performing. Indeed, his injury resulted while he was observing a high pressure test on a pipeline. Such a result has no connection with maritime activity. Wilander seeks to obtain status under the Act, first and foremost, because he rode a boat to the site of his accident, and such should not be allowed.

It should never have gotten to the jury. As a matter of law, Wilander should have been excluded from the scope of coverage because his function had nothing to do with the movement of the GATES TIDE. If it did not, he had no status as to that vessel, and, thus, no claim under American law.

CONCLUSION

The inventiveness of American lawyers, seeking the "more attractive" benefits of the Jones Act (*c.f.* Judge Gee's concurrence in *Barrett*) has complicated a simple proposition: the protection of American seamen, and the creation and support of an American merchant marine.

Should workers on specialty vessels be seamen? No blanket statement can be made. Such a plethora of workers comes to mind that a uniform definition of terms interspersed throughout, such as "navigation," "function of the vessel," and "traditional maritime activity" can get lost in the translation.

When the words of the Act are accorded their everyday meaning, it is clearly intended not to protect oilfield workers, but members of the American merchant fleet. Its scope could be broadened, it is argued, to those who show some common characteristics with sailors, such as whether they routinely and ordinarily face the "perils of the sea" in their work. *Robertson*, "Current Problems in Seaman's Remedies: Seaman Status, Relationship between Jones Act and LHWCA, and Unseaworthiness Actions by Workers not covered by LHWCA," 45 *La. Law Review* 875 (1985), at p. 887.

But even with that test, Wilander fails in his attempt to obtain the benefits of a seaman. Wilander was a platform worker, pure and simple, whose occupation required him to travel to and from the place of its performance by water. While he may have faced some of the same "perils of the sea" as traditional sailors, he did so in no different fashion than a resident of Staten Island riding to work in Manhattan on the ferry.

Among the Circuits, the Fifth stands alone in its rejection of navigational function as a true measure of the connection between "maritime commerce" and the person claiming benefits under the Act. Two justices of this Court have recognized this conflict. *See, Lormand v. Aries Marine Corporation, et al,* 484 U.S. 1031, 108 S.Ct. 789, 98 L.Ed.2d 774 (1988) and *International Oilfield Divers, Inc., et al v. Pickle,* 479 U.S 1059, 107 S.Ct. 939 (1987).

If *Barrett* was intended to clarify, it has confused. Not only that, it has led to absurd results. In this case, other than the fact of Wilander's home residence status in the Western District of Louisiana, there is no rational connection between the Fifth Circuit and the *situs* of Wilander's accident. Thus, there is no ready reason the Fifth Circuit's test should apply to a determination of Wilander's status, save the location of the litigation. Clearly, one of the driving factors of *Robison* is absent; oil and gas exploration off the Louisiana and Texas costs (*Robison*, at p. 780).

McDermott International, Inc. would have been amenable to service to a Tennessee resident alleging injury identical to Wilander's, under circumstances identical to his. If the fortuitous placement of this lawsuit had been in Memphis rather than Lake Charles, Wilander would have failed to meet the test of status.

The strength of our admiralty law has been its uniformity. Where doubt exists, decisions upholding the uniformity of maritime law use that criteria as the supreme decision-maker. *See, e.g., Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970); *Southern Pacific Company v. Jensen*, 244 U.S. 205, 37 S.Ct. 524 (1916); *Offshore Logistics v. Tallentire*, 477 U.S. 207, 106

S.Ct. 2485, 91 L.Ed.2d 174 (1986); *Director OWCP v. Perini North River Associates, et al*, 459 U.S. 297, 108 S.Ct. 634, 74 L.Ed.2d 465 (1983); *Executive Jet, supra.*

A drilling contractor with rigs in the Gulf of Mexico and the Pacific Ocean has no assurance of the status his workers occupy, whether they are covered by the Jones Act or the LHWCA, and, ultimately, what insurance he needs to buy to cover losses which result from that activity.

Jones Act litigation is a significant portion of the docket of Louisiana and Texas courts, federal and state. Insofar as this issue is concerned, those states may as well have seceded from the Union.

The facts of this case, in particular, cry out for a uniform national rule, without which a federal district court cannot, with any confidence, state the "American law" which applies to a foreign transaction alleged to be maritime in nature. For this reason, Petitioner prays for relief consisting of this Court's reversal of the decision of the Fifth Circuit insofar as it finally determines Wilander to have status under the Jones Act, and remand of the case for further consideration of any other claim Wilander may have.

Respectfully submitted,

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